

The Honorable Thomas O. Rice

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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON**

I.V., a minor child; and APRIL  
OLIVARES and FERNANDO  
OLIVARES VARGAS, parents of I.V.

Plaintiffs,

vs.

Y.A.F., a minor child, MARIA M.  
PEREZ FLORES, as guardian of  
Y.A.F., WENATCHEE SCHOOL  
DISTRICT NO. 246, a political  
subdivision; TAUNYA BROWN,  
individually and in her capacity as an  
official of Orchard Middle School  
and/or Wenatchee School District;  
JEREMY WHEATLEY, individually  
and in his capacity as an official of  
Orchard Middle School and/or  
Wenatchee School District, RONDA  
BRENDER, individually and in her  
capacity as an official of Orchard  
Middle School and/or Wenatchee  
School District; KELLI OTTLEY,  
individually and in her capacity as an  
official of Orchard Middle School  
and/or Wenatchee School District;  
ELLEN McIRVIN, individually and in  
her capacity as an official of Orchard  
Middle School and/or Wenatchee  
School District

Defendants.

**No. 2:17-CV-118-TOR**

**PLAINTIFFS' RESPONSE TO  
DEFENDANT WENATCHEE  
SCHOOL DISTRICT'S AND  
SCHOOL DISTRICT  
DEFENDANTS' MOTION TO  
DISMISS 42 U.S.C. § 1983  
CLAIMS**

**PLAINTIFFS' RESPONSE TO DEFENDANT  
WENATCHEE SCHOOL DISTRICT'S AND  
SCHOOL DISTRICT DEFENDANTS' MOTION TO  
DISMISS 42 U.S.C. § 1983 CLAIMS**

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## INTRODUCTION

This matter arises from a course of sexual assault, harassment, threats, and bullying over a period of years at Orchard Middle School in Wenatchee, Washington. The Complaint alleges that I.V., a Plaintiff, was the victim of this course of abuse and that the Defendants knew of the conduct, did nothing to prevent it despite contrary assurances, and affirmatively acted to allow it to continue.

The basic principle is that "[T]he Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests." *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 196, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989). Therefore, "the Fourteenth Amendment typically 'does not impose a duty on [the state] to protect individuals from third parties.'" *Patel v. Kent Sch. Dist.*, 648 F.3d 965, 971 (9th Cir. 2011) (quoting *Morgan v. Gonzales*, 495 F.3d 1084, 1093 (9th Cir. 2007)). There are, however, two exceptions: (1) the "special-relationship" exception, and (2) the "danger-creation" exception. *Id.* at 971-72.

The Defendants have moved to dismiss the Plaintiffs' 42 USC §1983 claims for failure to state a claim upon which relief can be granted. Plaintiffs respond that the claims set forth in the complaint state a valid claim for relief pursuant to the state created danger exception.

## FACTS

While Plaintiff I.V. was a 14 year old student at Orchard Middle School, he was the victim of sexual molestation, assault, abuse, threats and bullying. *ECF 1, pp.4-5.* All of these acts took place on school grounds. (*Id.*) Beginning in 2013, when I.V. entered the 6<sup>th</sup> Grade, he was immediately bullied, harassed and his very life was even threatened. (*Id.*) As a direct result to his being physically assaulted threatened and bullied, I.V. developed critical physical and mental health issues which required hospitalization to save his life. *ECF 1, pp. 7-8.* In Early 2015, I.V. disclosed the bullying and abuse at school to his parents, but I.V. was unwilling to identify the bully. I.V.'s mother then contacted the school's counselor, Defendant Ronda Brender and informed her of the bullying and abuse and the impact it was having on I.V. Ms. Brender said she would speak with other students and then identify the bully to the Plaintiff. The bully was not located by any agent of the school and I.V. continued to suffer the continued abuse, threats and assaults. *ECF 1, p. 8.*

After being hospitalized again and requiring intensive in-home medical care, on January 3, 2016, I.V. disclosed the identity of his tormentor to his parents, telling them he was afraid to go back to school after the winter break. *ECF 1, p. 9.* The next day, Ms. Olivares met with Taunya Brown, the school principal, to disclose the bullying of I.V by Y.A.F. During the meeting, I.V. reported that Y.A.F. had threatened to kill him. Principal Brown promised to take action, but in fact did nothing. (*Id.*) Ms.



1 Olivares reported the situation to the police and the next day Y.A.F. was arrested. The  
2 Police investigation uncovered past school video evidence of the bullying events and  
3 Y.A.F. admitted to threatening I.V. Confronted with video evidence of the assaults,  
4 the school justified its inaction by claiming a high volume of potential video footage  
5 caused it to ignore the potential evidence. *ECF 1, p. 10.*

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8 On January 19, 2016, Chelan County Superior Court Judge T.W. Small signed  
9 and filed a protection order restraining Y.A.F. from any contact with I.V. and from  
10 attending the school in question. (*Id.*) Ms. Olivares informed both principal Brown  
11 and Counselor Brenner of the protection order prohibiting Y.A.F. from attending  
12 school. Despite that, Y.A.F. was allowed to continue to attend school and bully I.V.,  
13 in violation of the court's protection order. *ECF 1, p. 10-11.*

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16 On February 4, 2016, Ms. Olivares contacted WSD Executive Director of  
17 Student Services Mr. Helm, who admitted the district was at fault for wrongfully  
18 allowing Y.A.F. to attend school and continue to bully I.V. in violation of the  
19 protection order. He said, as a former principal, he would never have allowed  
20 something like this to happen. *ECF 1, p. 12.*

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23 On February 21, 2016, Ms. Brenner contacted another student asking if they  
24 knew of I.V. suing the school, asking the student to speak with a lawyer, and  
25 requesting help in an effort to save Principal Brown's job. (*Id.*)  
26



Y.A.F.'s bullying and threats of I.V. on school property continued. As a direct consequence, I.V. attempted to commit suicide and was again hospitalized for mental and physical health issues. *ECF 1, P. 13*.

### 12(b)(6) LEGAL STANDARD

Rule 12(b)(6) authorizes a court to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "The nature of a Rule 12(b)(6) motion tests the sufficiency of the allegations within the four corners of the complaint after taking those allegations as true." *Mobley v. McCormick*, 40 F.3d 337, 340 (10th Cir. 1994). The sufficiency of a complaint is a question of law, and, when considering a rule 12(b)(6) motion, a court must accept as true all well-pleaded factual allegations in the complaint, view those allegations in the light most favorable to the non-moving party, and draw all reasonable inferences in the plaintiff's favor. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007)("[O]nly if a reasonable person could not draw . . . an inference [of plausibility] from the alleged facts would the defendant prevail on a motion to dismiss."); *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009)("[F]or purposes of resolving a Rule 12(b)(6) motion, we accept as true all well-pleaded factual allegations in a complaint and view these allegations in the light most favorable to the plaintiff." (citing *Moore v. Guthrie*, 438 F.3d 1036, 1039 (10th Cir. 2006))).



1 A complaint need not set forth detailed factual allegations, yet a "pleading that  
 2 offers labels and conclusions or a formulaic recitation of the elements of a cause of  
 3 action" is insufficient. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L.  
 4 Ed. 2d 868 (2009)(citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct.  
 5 1955, 167 L. Ed. 2d 929 (2007)). "Threadbare recitals of the elements of a cause of  
 6 action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*,  
 7 556 U.S. at 678. "Factual allegations must be enough to raise a right to relief above  
 8 the speculative level, on the assumption that all the allegations in the complaint are  
 9 true (even if doubtful in fact)." *Bell Atl. Corp. v. Twombly*, 550 U.S. at 555 (citation  
 10 omitted).

14 To survive a motion to dismiss, a plaintiff's complaint must contain sufficient  
 15 facts that, if assumed to be true, state a claim that is plausible on its face. *See Bell Atl.*  
 16 *Corp. v. Twombly*, 550 U.S. at 570; *Mink v. Knox*, 613 F.3d 995, 1000 (10th Cir.  
 17 2010). "A claim has facial plausibility when the pleaded factual content allows the  
 18 court to draw the reasonable inference that the defendant is liable for the misconduct  
 19 alleged." *Ashcroft v. Iqbal*, 556 U.S. at 678 (citing *Bell Atl. Corp. v. Twombly*, 550  
 20 U.S. at 556). "Thus, the mere metaphysical possibility that some plaintiff could prove  
 21 some set of facts in support of the pleaded claims is insufficient; the complainant must  
 22 give the court reason to believe that this plaintiff has a reasonable likelihood of  
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1 mustering factual support for these claims." *Ridge at Red Hawk, LLC v. Schneider*,  
 2 493 F.3d 1174, 1177 (10th Cir. 2007)(emphasis omitted).

### 4 ARGUMENT AND AUTHORITY

5 PLAINTIFF HAS STATED A VALID CLAIM FOR RELIEF UNDER 42 U.S.C.  
 6 §1983 PURSUANT TO THE STATE CREATED DANGER EXCEPTION TO THE  
 7 DUE PROCESS CLAUSE.

#### 8 A. GENERAL AUTHORITY.

9 "[T]he Due Process Claus generally confers no affirmative right to  
 10 governmental aid, even where such aid may be necessary to secure life, liberty, or  
 11 property interests." *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189,  
 12 196, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989). Therefore, "the Fourteenth Amendment  
 13 typically 'does not impose a duty on [the state] to protect individuals from third  
 14 parties.'" *Patel v. Kent Sch. Dist.*, 648 F.3d 965, 971 (9th Cir. 2011) (quoting *Morgan*  
 15 *v. Gonzales*, 495 F.3d 1084, 1093 (9th Cir. 2007)). There are, however, two  
 16 exceptions: (1) the "special-relationship" exception, and (2) the "danger-creation"  
 17 exception. *Id.* at 971-72.

#### 21 B. SPECIAL RELATIONSHIP EXCEPTION.

22 The Supreme Court formally established the special relationship exception and  
 23 found that it applies when the state "takes a person into its custody and holds him there  
 24 against his will." *DeShaney*, 489 U.S. at 199-200. The exception applies when a state  
 25 "takes a person into its custody and holds him there against his will." *Id.* at 199-200.  
 26



1 The types of custody triggering the exception are "incarceration, institutionalization,  
 2 or other similar restraint of personal liberty." *Id.* at 200. When a person is placed in  
 3 these types of custody, due process claims re allowed against the state for a fairly  
 4 simple reason: a state cannot restrain a person's liberty without also assuming some  
 5 responsibility for the person's safety and well-being. *Id.* at 199-200. Under this  
 6 exception, the state's constitutional duty arises "not from the State's knowledge of the  
 7 individual's predicament or from its expressions of intent to help him, but from the  
 8 limitation which [the State] has imposed on his freedom." *Id.* at 200. In other words,  
 9 the person's substantive due process rights are triggered when the state restrains his  
 10 liberty, not when he suffers harm caused by the actions of third parties. *Id.* at 195,  
 11 200.

12 The question of whether or not such a special relationship exists in a  
 13 compulsory school attendance context was first taken up by the 9<sup>th</sup> Circuit in *Patel v.*  
 14 *Kent Sch. Dist.*, 648 F.3d 965 (9<sup>th</sup> Cir. 2011). In said case, the Court concluded that,  
 15 "Compulsory school attendance and *in loco parentis* status do not create 'custody'  
 16 under the strict standard of *DeShaney*." *Id.* at 973. The issue has been since questioned  
 17 by numerous cases under various fact patterns, but currently, Patel has not been  
 18 distinguished and appears to be applicable law.

19 While *Patel* clearly states compulsory school attendance does not create a  
 20 special relationship between school and student, it is argued here that once an Order



1 of Protection is executed by a court of competent jurisdiction and the school is notified  
 2 of the Order's existence, a special relationship is formed, and the school must care for  
 3 the subject student at the same standard previously reserved for those in a classic  
 4 custodial relationship.  
 5

### 6 C. STATE CREATED DANGER EXCEPTION.

7 The "danger-creation" exception applies where there is (1) "affirmative conduct  
 8 on the part of the state in placing the plaintiff in danger," and (2) "the state acts with  
 9 'deliberate indifference' to a 'known or obvious danger.'" *Patel*, 648 F.3d at  
 10 974 (quoting *Munger v. City of Glasgow Police Dep't*, 227 F.3d 1082, 1086 (9th Cir.  
 11 2000); *L.W. v. Grubbs*, 92 F.3d 894, 900 (9th Cir. 1996)). The Ninth Circuit's "'state-  
 12 created danger' cases... contemplate § 1983 liability for the state actor who, though  
 13 not inflicting plaintiff's injury himself, has placed plaintiff in the harmful path of a  
 14 third party not liable under § 1983." *Kennedy v. City of Ridgefield*, 439 F.3d 1055,  
 15 1082 (9th Cir. 2006).  
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20 In this case, there are both 1) affirmative conduct on the part of the state in  
 21 placing I.V. in danger and, 2) state actions with deliberate indifference to a known or  
 22 obvious danger as alleged in the complaint.  
 23

24 In review of the facts, the State's affirmative conduct in placing I.V. in danger  
 25 and deliberate indifference to known obvious danger becomes clear. The Defendants  
 26 were first notified of the bullying issue in 2015 and did nothing. No investigation took



1 place and the identity of the bully was not found. Next, when the bully was identified  
 2 by I.V. and his mother, the school again did nothing despite promising to stop the  
 3 abuse. School video evidencing the threats and assaults were not reviewed, despite  
 4 their subsequent discovery and inspection by the police. When a protection order was  
 5 obtained by from the court, Defendants continued to allow Y.A.F. to attend school  
 6 and continue his malicious conduct towards I.V., in violation of the order despite their  
 7 clear knowledge of its existence and terms. Finally, Defendants embarked on a course  
 8 of action to prepare for any possible lawsuit and endeavor to save the school  
 9 Principal's job. These facts as stated in the Complaint state a valid claim and support  
 10 a denial of the Defendant's Motion to Dismiss.

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 15       Reviewing previous 9<sup>th</sup> Circuit cases where the Courts have found an  
 16 affirmative act implicating the danger created exception also support a finding on  
 17 behalf of Plaintiffs. It is noteworthy that both Plaintiffs and Defendants cite the same  
 18 authorities as proof of their positions. However, unsurprisingly, the parties interpret  
 19 them differently. Defendants claim that these authorities are instructive because they  
 20 somehow required a higher level of state action then the present matter. Plaintiffs  
 21 however argue that, as is always the case in a liability for the actions of a third party  
 22 situation, the acts or omissions to act as reflected in the following authorities are  
 23 persuasive examples of similar actions to those in this matter, and give rise to a valid  
 24 claim for liability.



1 *L.W. v. Grubbs*, 92 F.3d 894 (9<sup>th</sup> Cir. 1996) is instructive. Here a prison assigned  
2 a nurse to work in proximity with a violent sex offender without warning her of his  
3 proclivities. When alone, he assaulted her and attempted to rape her. *Grubbs* is similar  
4 to the present matter for the State in both instances allowed a known abuser to be in  
5 proximity with a victim in a State controlled environment, leading to acts of abuse  
6 similar to those known of in the past. The nurse was not “custodial” as in special  
7 relationship cases, but rather enjoyed status consistent with a student as described in  
8 *Patel*.

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12 In *Penilla v. City of Huntington Park*, 115 F.3d 707 (9<sup>th</sup> Cir. 1997), police  
13 arrived and found an ill individual on his porch, placed him in his home, and elected  
14 to cancel a neighbor’s previous call for emergency services. The individual suffered a  
15 serious subsequent medical event. Again, *Penilla* is analogous to this matter as the  
16 State actor in both was alerted to a dangerous condition, did nothing, and denied  
17 requested assistance.  
18

19  
20 Police in *Munger v. City of Glasgow Police Dep’t*, 227 F.3d 1082 (9<sup>th</sup> Cir. 2000)  
21 kicked an intoxicated patron out of a bar who was wearing only a t-shirt and jeans.  
22 The weather was freezing, and he suffered hypothermia. Just like in the present case,  
23 the state actors in *Munger* acted (or failed to act) to subject an individual to a danger  
24 which was clearly known.  
25  
26



1 In *Wood v. Ostrander*, 879 F.2d 583 (9<sup>th</sup> Cir. 1989), police arrested a driver for  
2 a DUI but left the passenger in the car alone and unattended in a dangerous  
3 neighborhood, where she was subsequently picked up by a stranger and raped.  
4 Similarly, in this case, the State actors left I.V. alone and without aid in an  
5 environment known to be unsafe due to Y.A.F.'s continuous abuse.  
6

7  
8 Finally, in *Kennedy v. City of Ridgefield*, 439 F.3d 1055 (9<sup>th</sup> Cir. 2006), police  
9 assured a mother who reported the molestation of her daughter by a neighbor that they  
10 would not contact the suspect without warning her first. They then interviewed the  
11 suspect without warning the reporting party. The reporting party was shot dead in her  
12 home the following morning. Just like in this case, the State actors were notified of a  
13 potential danger, made assurances, but did not follow through and allowed the danger  
14 to occur.  
15

16  
17 The Defendants rely upon *Johnson v. City of Seattle*, 474 F.3d 634 (9<sup>th</sup> Cir.  
18 2007), and claim it relates to this matter. However, *Johnson* is entirely distinguishable.  
19

20 In *Johnson*, plaintiffs suffered injuries when police were passively controlling  
21 a crowd during a Mardi Gras celebration at Pioneer Square in Seattle. Defendants  
22 claim that the police's decision to switch from a more aggressive operation plan to a  
23 passive plan was not affirmative conduct and relate it to the State actors in this case.  
24 However, this comparison is flawed. In *Johnson*, the police had no exact advanced  
25 knowledge or warning of potential dangers. In this case, the School officials were  
26



1 notified of exactly the nature of the danger I.V. was facing from Y.A.F.'s abuse. The  
 2 individual choices and conduct of State agents are completely different as one had  
 3 warning and knowledge of the potential threat while the other did not. The present  
 4 matter is more analogous to *Grubbs*, *Penilla*, *Munger*, *Wood* and *Kennedy* for  
 5 persuasive comparison than it is to *Johnson*.  
 6

7  
 8 Defendants argue that the State actions or omissions to act did not place I.V. in  
 9 a worse position than he would have been in if they had done nothing at all, therefore  
 10 the affirmative conduct requirement cannot be met. This argument is incorrect. As  
 11 alleged in the Complaint, at the very least, the Defendants not only failed to act despite  
 12 their assurances to do so, but they actively ignored a valid superior court protective  
 13 order and allowed a known harassing and assaulting individual back onto school  
 14 premises, where his tormenting continued. Finally, and most pointedly, they attempted  
 15 to recruit a minor to falsely testify in order to preserve the job of a school official.  
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## 18 CONCLUSION

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 20 Based upon the forgoing, Plaintiffs' argue that they have sufficiently stated a  
 21 claim upon which relief can be granted under 42 USC §1983 and the state created  
 22 danger exception, which provides for state party liability of third party actions. As  
 23 such, Plaintiffs respectfully request that the Defendants' motion to dismiss be denied.  
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1 DATED this 18<sup>th</sup> day of September, 2017.

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3  
4 VOLYN LAW FIRM

5 /s/ Scott A. Volyn

6 Scott A. Volyn, WSBA #21829

7 Attorney for Plaintiffs  
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**CERTIFICATE OF SERVICE**

The undersigned makes the following declaration certified to be true under penalty of perjury pursuant to RCW 9A.72.085:

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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DATED this 18<sup>th</sup> day of September, 2017, at Wenatchee, Washington.

  
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